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No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,

v.

EUGENE F. BRIECK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a plaintiff who alleges intentional discrimination can survive summary judgment merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate?

PARTIES

The parties to the proceeding in the court below were: Eugene F. Brieck and Harbison-Walker Refractories, a Division of Dresser Industries, Inc.*

* Dresser Industries, Inc. ("Dresser") is a corporation whose shares are publicly held. Dresser has an interest in the following corporate entities and partnerships: Airetool and Yost Superior Realty, Inc.; Bartil, Inc.; IRI International Corporation; Kewaunee Engineering Corporation; Standard Oil Proppants, L.P.; Road Machinery Company; BJ Titan Services Company; Dresser-Rand Company; M-I Drilling Fluids Company; Dresser-Cullen Venture; Western Atlas International, Inc.; and Worthington Pump Asia Pte. Ltd.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Harbison-Walker Refractories, a Division of Dresser Industries, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 19, 1987.

OPINIONS BELOW

The unreported opinion of the Court of Appeals appears in the Appendix at 1a to 11a. The December 19, 1985 opinion of the United States District Court for the Western District of Pennsylvania is reported at 624 F. Supp. 363, and is reproduced in the Appendix at 12a to 21a. The District Court's January 16, 1986 memoran-

dum opinion and order denying Respondent's request for reconsideration is unreported and appears in the Appendix at 22a to 25a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on June 19, 1987. Jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 4(a)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA" or the "Act"), provides in pertinent part:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

29 U.S.C. § 623(a)(1).

STATEMENT

Harbison-Walker Refractories ("Harbison-Walker" or the "Company") sells specialized ceramic brick products primarily to steel producers. App. at 12a. In June 1965, it hired Respondent, Eugene Brieck, as an installation specialist in its Iron and Steel Marketing Support Group (the "Steel Group"). App. at 13a. Respondent, like the Steel Group's other such specialists, supervised the installation of the Company's ceramic brick products. *Id.*

By 1982, the economic decline in the domestic steel industry had taken its toll on the Company's sales. From 1979 to 1982, its sales of ceramic brick products fell nearly 30 percent, and profits from those sales plummeted from approximately $64 million to a deficit of $20 million. App. at 12a-13a.

Faced with mounting losses, Harbison-Walker reduced its workforce. In early July 1982, it laid off several employees in its Steel Group, including Respondent, then 55 years of age, and an older but less senior installation specialist. App. at 13a. Within a month, the Company terminated another installation specialist, but retained 39-year-old Hugh Faust, an installation specialist who had only slightly less seniority than Respondent, for an additional four months. App. at 13a, 17a. It did so, *inter alia*, because Faust's diverse skills and broader experience rendered him more versatile in the reduced Steel Group. Specifically, the Company retained Faust longer because—unlike Respondent—he had (1) considerable prior experience as a sales correspondent; (2) superior experience in working with records and written reports, including the preparation of bids and quotations; and (3) experience in installation work in blast furnace casthouses—a targeted growth area for Harbison-Walker. App. at 3a-4a. In addition, Faust had slightly higher performance ratings than Respondent. App. at 4a.

In mid-November 1982, however, the Company also laid off Faust.[1] Nearly nine months later, when sales increased slightly, Harbison-Walker recalled Faust to its still-struggling Steel Group. App. at 13a.

The Proceedings Below

On June 29, 1984, Respondent filed suit alleging that Harbison-Walker terminated and failed to recall him because of his age. After discovery, the Company moved for summary judgment. It argued that Respondent had not established a prima facie case of age discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

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[1] App. at 13a. From June 1982 to November 1982, the Company laid off eleven of the 32 employees of the Steel Group; only three of those laid off were over age 40. Significantly, over half of the 21 employees remaining in the Steel Group after these layoffs were 40 years of age or older. App. at 17a.

(1973), and that, even assuming he had, the Company terminated him for legitimate, nondiscriminatory business reasons. Further, the Company contended that, because Respondent failed to produce any evidence that the proffered business reasons were a pretext for discrimination, no genuine issue of fact remained for trial.

In opposing summary judgment, Respondent did not dispute that Faust had experience with marketing and administrative matters which he did not have. App. at 4a. Nor did he dispute that some portion of Faust's work, albeit less than 25 percent, drew upon this experience. App. at 5a. Rather, he argued only that Faust's experience was unimportant, in that he spent 75 percent of his time performing installation work for which Respondent was equally qualified. *Id.* In short, Respondent did not dispute that Faust had more diverse experience, and that, from time to time, Harbison-Walker utilized that experience. He questioned only the Company's business judgment that such diverse experience was utilized enough to justify Faust's, and not Respondent's, recall.

The district court ruled that no material facts were in dispute. Although holding that Respondent had established a prima facie case of age discrimination, it nonetheless concluded that the Company had articulated legitimate, nondiscriminatory business reasons for its decision to retain Faust, rather than Respondent. App. at 15a-17a. Specifically, the district court found that, although Faust had slightly less seniority than Respondent, he had slightly better performance evaluations and broader experience in marketing and administrative functions. App. at 16a. Because Respondent merely questioned the Company's business judgment, without "forg[ing] the critical link between [the challenged] actions and [Respondent's] age with *relevant* proof," App. at 23a (emphasis in original), the court concluded that Respondent's evidence could not satisfy his burden of persuasion that

age motivated the Company's decision. Thus, absent evidence that any possible error in Harbison-Walker's business judgment was a pretext for age discrimination, the district court declined Respondent's invitation to second-guess the Company's decision.

The Third Circuit reversed. Relying solely on its recent decision in *Chipollini v. Spencer Gifts*, 814 F.2d 893 (3d Cir. 1987) (*en banc*), *petition for cert. filed*, 55 U.S.L.W. 3872 (U.S. June 17, 1987) (No. 86-2007), it concluded that:

> To meet its burden on summary judgment, the defendant employer must show that the plaintiff will be *unable to introduce* either direct evidence of a purpose to discriminate, or *indirect evidence of that purpose by showing that the [employer's] proffered reason is subject to factual dispute.*

App. at 4a (emphasis added). It further stated that, to defeat his employer's motion, Respondent was not required to "establish a direct inference that the employer discharged him because of his age." App. at 2a. Rather, the court concluded, Respondent need only "cast doubt" on the credibility of his employer's articulated reasons so as to "permit a reasonable inference that the employer's proffered explanation for the discharge is *unworthy of credence.*" App. at 2a (emphasis added).[2]

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[2] In *Chipollini*, the employer discharged the plaintiff as part of staff reductions, but retained a younger employee, allegedly because the younger employee was considered better able to handle work in a reduced department and because the plaintiff had failed to perform certain projects satisfactorily. After the plaintiff sued, and discovery was completed, the employer sought summary judgment. To defeat summary judgment, the plaintiff introduced evidence which contradicted the facts underlying the employer's decision, but introduced no evidence of age discrimination. The district court granted the employer's motion because the plaintiff raised no issue of fact as to whether age motivated the employer's decision. The Third Circuit reversed, finding, as it did in the instant case, that a plaintiff can survive summary judgment merely by demon-

Applying these standards, the court of appeals held that Respondent's self-serving claim—that the "small" amount of time (less than 25 percent) that Faust spent on non-installation duties rendered Harbison-Walker's business judgment suspect—was sufficient to defeat summary judgment. According to the court below, the Company's asserted need for Faust's admittedly diverse experience and its use of that experience for less than 25 percent of the time constituted " 'evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for (those) non-discriminatory reasons.' " App. at 4a, *quoting Chipollini*, 814 F.2d at 900.[3]

Judge Weis dissented, stating that (App. at 8a-10a):

> Essentially, the plaintiff's evidence is that he believed himself to be a better qualified installation specialist than Faust.
>
> * * * *
>
> Basically, plaintiff contends that because Faust spent twenty-five percent of his time after recall preparing reports of installations (an activity Brieck had performed) as well as working on "margins" and filing (tasks which Brieck neither had done nor was trained to do), the employer has failed to demonstrate its need for Faust's diverse qualifications.
>
> * * * *

strating that the employer's proffered reason is not credible and without introducing evidence that age in fact motivated the employer's decision. Judge Hunter dissented. He stated that "it is not enough for the plaintiff to show pretext in order to withstand the defendant's motion for summary judgment; . . . he must go further, and show that the proffered explanation is a pretext specifically for age discrimination." 814 F.2d at 902. In his view, by requiring less, the majority "effectively and impermissibly shifted the burden of persuasion from [the plaintiff] to [his employer]." *Id.* at 903.

[3] Having found this "inconsistency," the court did not address the remaining—and largely uncontested—reasons for the Company's termination of Respondent.

> When reduced company operations warrant the service of one installation specialist for only seventy-five percent of his time, efficiency requires some utilization of the remaining twenty-five percent. Although plaintiff may argue he could work as effectively for part of that time, significantly he cannot prove his ability to perform equally well for the entire 25 percent period. The concession that he, unlike his rivals, might require training only underscores the validity of the employer's reason for selecting Faust.

Judge Weis thus concluded that Respondent had "failed to show a dispute of fact on a material issue which would demonstrate pretext." App. at 11a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH PRINCIPLES ESTABLISHED BY THIS COURT.

This case presents a critically important, and frequently recurring, issue of federal law: whether a plaintiff who alleges intentional discrimination can survive summary judgment merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate. The Third Circuit held that he can. That decision conflicts with three principles established by this Court: first, that the ultimate burden of persuasion in a discrimination case "remains at all times with the plaintiff" who must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination," *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); second, that summary judgment must be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," *Celotex Corp. v. Ca-*

trett, 106 S. Ct. 2548, 2552-53 (1986); and third, that the ADEA "was not intended to 'diminish traditional management prerogatives,'" *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 259, *quoting United Steelworkers of America v. Weber*, 443 U.S. 193, 207 (1979).

A. The Decision Below Contravenes This Court's Allocation Of Evidentiary Burdens In Employment Discrimination Cases And Standards For Summary Judgment.

In employment discrimination cases, the plaintiff bears the initial "burden of proving by the preponderance of the evidence a prima facie case of discrimination." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 252-53; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Once it does so, creating an "inference of unlawful discrimination," *id.* at 253, the burden then "shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employ[ment action].'" *Id.*, *quoting McDonnell Douglas v. Green*, 411 U.S. at 802; *see also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). If the defendant carries this burden of production, it "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence," and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255 and n. 10. Because the ultimate burden of persuasion "remains *at all times* with the plaintiff," he must then "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a *pretext for discrimination.*" *Id.* at 253 (emphasis added).

In summary judgment proceedings, courts must view the evidence presented "through the prism of the[se] substantive evidentiary burden[s]." *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2513 (1986). To be sure, an

employer seeking summary judgment in an employment discrimination case bears the burden of showing that no genuine issue of material fact exists to be tried. *See* Fed. R. Civ. P. 56(c). "[B]ut the plaintiff is not thereby relieved of his own burden of producing in turn [affirmative] evidence that would support a jury verdict." *Anderson v. Liberty Lobby*, 106 S. Ct. at 2514; *see also Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356 (1986) (citations and footnote omitted) ("[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts").

Because an ADEA plaintiff always bears the ultimate burden of persuasion on his discrimination claim, he may avoid summary judgment only by producing specific evidence demonstrating that a genuine issue of *material* fact remains for trial. *See* Fed. R. Civ. P. 56(e).[4] Indeed, as this Court held in *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986) (emphasis added):

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who *fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.* In such a situation, there can be 'no genuine issue as to any material fact,' since a com-

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[4] As this Court has aptly noted, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby*, 106 S.Ct. at 2510 (emphasis in original). Moreover, "[i]f the evidence is merely colorable, *Dombrowski v. Eastland*, 387 U.S. 82, 87 S. Ct. 1425, 18 L. Ed.2d 577 (1967) (*per curiam*), or is not significantly probative, [*First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253,] 290, 88 S. Ct. at 1592, summary judgment may be granted." *Id.* at 2511.

plete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Read together with *McDonnell Douglas* and *Burdine*, therefore, *Celotex* and *Liberty Lobby* require an ADEA plaintiff opposing summary judgment to adduce—as he would have to at trial—sufficient evidence to support the essential element of his case: that he was the victim of discrimination "because of [his] age." [5]

The decision below requires substantially less. It permits a plaintiff claiming employment discrimination to avoid summary judgment simply by second-guessing his employer's business judgment, even though he admits all of the facts underlying that judgment, even though the

[5] Significantly, the mere fact that a plaintiff establishes a prima facie case of age discrimination does not mean that summary judgment is improper. *See, e.g., Grigsby v. Reynolds Metal Co.*, 821 F.2d 590 (11th Cir. 1987); *Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987); *Pace v. Southern Railway System*, 701 F.2d 1383, 1389 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983); *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983). Nor does the employer's articulation of a legitimate, nondiscriminatory reason for an employment action necessarily create a question of fact warranting trial. *See, e.g., Grigsby v. Reynolds Metal Co., supra*; *Klein v. Trustees of Indiana University*, 766 F.2d 275, 281-82 (7th Cir. 1985); *Pace v. Southern Railway System*, 701 F.2d at 1391. Rather, to create a genuine issue of material fact for trial, the plaintiff cannot "merely rest on the laurels of her prima facie case in the face of powerful justification evidence offered by the defendant", but must introduce additional evidence that the employer's actions are a pretext for *discrimination*. *See Grigsby v. Reynolds Metal Co., supra*; *see also* discussion *infra* at 15-19. The need for such additional evidence is obvious where, as in the Third Circuit, a plaintiff can establish a prima facie case merely by demonstrating that he is in the protected age group and was laid off while younger employees were retained in similar jobs for which he was qualified. *See Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983).

legally mandatory inference of unlawful discrimination has "drop[ped] from the case", *Burdine*, 450 U.S. at 255 n. 10, and even though he has produced no specific evidence, direct or indirect, that the employer's judgment was really motivated by intentional discrimination. At the same time, the decision below enlarges the employer's legitimate summary judgment burden (i.e., to prove the absence of any *material* facts), and imposes on it a virtually unattainable one: to show that the plaintiff will be "unable" to create some factual dispute concerning the employer's proffered reasons.

Such a result comports with neither this Court's interpretation of Rule 56 nor its allocation of evidentiary burdens in employment discrimination cases. Contrary to *Burdine*'s conclusion that a "defendant need not persuade the Court that it actually was motivated by the proffered reasons," 450 U.S. at 254, an employer in the Third Circuit can prevail on summary judgment in an employment discrimination case only if it convinces the court that its business judgment is unimpeachable. Further, contrary to *Celotex*, the decision below relieves the ADEA plaintiff of his obligation to produce specific facts concerning an essential element of his case—intentional discrimination on the basis of age—in order to defeat summary judgment. Because the decision below is plainly at odds with this Court's decisions, and because of the importance of the issue presented, review should be granted.

B. The Decision Below Contravenes This Court's Recognition That The ADEA Should Not Interfere With Traditional Business Judgments.

The decision below contravenes yet another principle articulated by this Court: that the ADEA "was not intended to 'diminish traditional management prerogatives.'" *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 259, *quoting United Steelworkers*

of America v. Weber, 443 U.S. at 207; *see also Local No. 93, International Association of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3074 (1986) (in enacting Title VII of the Civil Rights Act, Congress intended "'management prerogatives . . . to be left undisturbed to the greatest extent possible'"), *quoting* H.R. Rep. No. 914, 88th Cong., 2d Sess., pt. 2, at 29 (1963).

That the ADEA was "not intended as a vehicle for judicial review of business decisions" is well-settled. *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *see also Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1218-19 (7th Cir. 1985); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982). As aptly stated by the court in *Parker v. Federal National Mortgage Association*, 741 F.2d 975, 981 (7th Cir. 1984):

> Decisions [as to the relative strengths and weaknesses of employees] will always involve a number of subjective factors, and disappointed candidates cannot expect a federal judge to intervene simply in the hope that he or she will evaluate the factors differently. The ADEA only requires the intervention of the federal judiciary when age is a determining factor in the decision.

See also Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987) ("This Court does not sit as a super-personnel department that reexamines an entity's business decisions"). Not surprisingly, therefore, courts have granted summary judgment in employment discrimination cases where an employee does nothing more than "challenge the judgment of his superiors through his own self-interested assertions." *Dale v. Chicago Tribune Co.*, 797 F.2d at 464-65; *see also Matthews v. Allis-Chalmers*, 769 F.2d at 1218.

The flaw in the decision below is thus plain. It allows an employee to avoid summary judgment, and to obtain judicial review of his employer's business judgment, merely by raising some subjective disagreement with that judgment. He can do so without producing evidence, direct or indirect, that his employer's judgment was motivated by unlawful discrimination. Because the decision below is thus at odds with the principles articulated by this Court, and permits an unwarranted encroachment into traditional management prerogatives, the Court should grant review.

II. THE DECISION BELOW VIRTUALLY ELIMINATES SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES.

Resolution of the issue presented here—whether an employee can survive summary judgment in an employment discrimination case without presenting any evidence that the employer's business judgment was motivated by an intent to discriminate—is vital because the "great majority" of such cases turn on precisely that point. *See* B. Schlei and P. Grossman, *Employment Discrimination Law* 1317 (2d Ed. 1983). (The "great majority" of intentional discrimination cases "turn on plaintiff's ability to demonstrate that the nondiscriminatory reason offered by the employer was a pretext for discrimination"). The impact of the decision below, if upheld, is thus far-reaching.

To hold, as the court below does, that an employee can defeat summary judgment merely by questioning the "credence" of his employer's articulated nondiscriminatory reasons tolls the death knell for summary judgment procedure in employment discrimination cases. An employee can nearly always introduce, through affidavits, some self-serving evidence that his employer's subjective business judgment was ill-advised. Having done so, he can submit his case to the jury without any direct or

indirect evidence of intentional discrimination. Simply stated, the decision below—if it stands—means that an employer will rarely, if ever, prevail on summary judgment in an employment discrimination case.[6]

That the decision below emasculates the role of summary judgment—in contravention of the important policies embodied in Rule 56 and recognized by this Court in *Celotex*—is thus plain. As this Court has noted, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 106 S. Ct. at 2555, *quoting* Fed. R. Civ. P. 1. Its recognized purpose is "to isolate and dispose of factually unsupported claims" before trial. *Id.* at 2553. But, by essentially eliminating summary judgment in employment discrimination cases, the decision achieves the opposite result. It fosters unnecessary trials of factually unsupportable cases brought by disgruntled employees who, by the decision below, are invited to second-guess their employers' business judgments.

The impact of the decision below, moreover, on the federal court dockets is potentially substantial. As of June 30, 1986, over 10,800 private employment-related civil rights cases were pending in the federal courts.[7] During

[6] The district court understood as much:

> Plaintiffs [sic] affidavits . . . are conclusory and refer to no corroborating evidence. It would be improper for a jury to decide for plaintiffs in discrimination cases on this evidence alone. To deny summary judgment on the basis of these statements would render Rule 56 meaningless, since such claims may be pleaded by plaintiffs in all cases regardless of their other merits.

App. at 23a.

[7] Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts (1986), Table S-12 (at 115).

the 12 months preceding that date, nearly 9,200 additional employment-related civil rights cases were filed in the federal district courts, representing a 13.5 percent increase in just one year.[8] Moreover, because of the reluctance of many courts to grant summary judgment in employment discrimination cases, a higher percentage of employment-related civil rights cases go to trial than any other category of federal question and diversity cases.[9]

The number of employment-related civil rights cases reaching trial—and, concomitantly, the costs of such litigation and the demand on judicial resources—can only increase as a result of the decision below. To restore summary judgment procedure to its proper role in employment discrimination litigation, this Court should grant the Petition.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNING SUMMARY JUDGMENT IN DISCRIMINATION CASES.

The decision below—that an ADEA plaintiff can defeat summary judgment without presenting any evidence, direct or indirect, that his employer's business judgment was tainted by an intent to discriminate—conflicts with the decisions of other federal courts of appeals. Review is thus necessary to resolve this conflict.

Contrary to the decision of the court below, the First, Sixth and Seventh Circuits have concluded that an ADEA plaintiff cannot avoid summary judgment merely by challenging the employer's articulated business reasons, but must link those allegedly "pretextual" reasons to unlawful discrimination. In *Dea v. Look*, 810 F.2d 12 (1st

[8] *Id.*, Tables C-2 (at 176) and C-2A (at 179).

[9] *Id.*, Table C-4 (at 206).

Cir. 1987), for example, the First Circuit affirmed a grant of summary judgment to an employer in an age discrimination case where the plaintiff, in response to his employer's proffered reasons for his discharge, merely challenged the credibility of those reasons. The court stated:

> [E]vidence contesting the factual underpinnings of the reason for the discharge proffered by the employer is insufficient, without more, to present a jury question. Plaintiff continues to carry the burden of showing discriminatory intent, and the relevant question is whether the given reason was a pretext for discrimination: 'It is not enough for the plaintiff to show that the employer made an unwise business decision, or an unnecessary personnel move. . . . These facts, even if demonstrated, do not necessarily show that the *age* was a motivating factor.' . . . [The plaintiff] cannot meet this burden of proving 'pretext' simply by refuting or questioning the defendants' articulated reason.

Id. at 15 (citations omitted and emphasis in original). *See also White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984) ("[m]erely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent"). The Sixth and Seventh Circuits have reached similar conclusions. *See Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987) (alternative holding) (to avoid summary judgment, a plaintiff "must do more than challenge the judgment of his superiors through his own self-interested assertions"; he "must establish a nexus between his evidence and age discrimination"); *Askin v. Firestone Tire & Rubber Co.*, 785 F.2d 307 (6th Cir. 1986), *aff'd without opinion*, 600 F. Supp. 751, 753 (E.D. Ky. 1985) (showing that an employer's articulated business reasons are "unreasonable or a pretext for some arbitrary or oppressive motive" will not, in the absence

of evidence that the reasons are "a pretext for age discrimination", defeat a summary judgment motion).[10]

The court below diverges from this reasoned analysis through an unduly restrictive reading of this Court's dictum in *Burdine*—namely, that the plaintiff's ultimate

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[10] *See also Grigsby v. Reynolds Metal Co.*, 821 F.2d 590 (11th Cir. 1987) ("conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [the employer] has offered . . . extensive evidence of legitimate, nondiscriminatory reasons for its actions"); *Klein v. Trustees of Indiana University*, 766 F.2d 275, 282 (7th Cir. 1985) ("To establish that a discriminatory reason more likely motivated the employer in taking the challenged action, the plaintiff must present evidence sufficiently substantial to show that, in addition to the defendant's proffered reasons, a discriminatory motive was a determining factor"); *Pace v. Southern Railway System*, 701 F.2d 1383, 1391 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983) ("[w]here the ADEA plaintiff has shown 'no evidence "which might infer that age was even a factor in the decision"' of which plaintiff complains summary judgment is warranted"); *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983) (to avoid summary judgment based on challenges to an employer's proffered reasons, employee must produce "specific, substantial evidence of pretext and that age was a determining factor in the decision"). That a mere challenge to the truth of an employer's proffered reasons does not mean that age instead was a motivating factor is obvious from the fact that an employer may have "pretextual", but entirely benign, reasons for its action. As aptly noted by the dissent in *Chipollini*:

> An employer's proffered reason for terminating an employee may be pretextual without violating the ADEA. . . . An employer motivated by ill-will, nepotism, or unpublicized financial problems in his termination of an employee is just as likely to use a pretextual explanation for his action as is an employer motivated by statutorily-prohibited discrimination. . . . Under such circumstances, we have no power under the ADEA to provide redress.

Chipollini v. Spencer Gifts, 814 F.2d at 903 (Hunter, J., dissenting); *see also Askin v. Firestone Tire & Rubber Co.*, 600 F. Supp. at 755; *Holly v. City of Naperville*, 603 F. Supp. 220, 230-31 n.4 (N.D. Ill. 1985).

burden of persuasion on the issue of intentional discrimination can be discharged "indirectly by showing that the employer's proffered explanation is *unworthy of credence.*" 450 U.S. at 256 (emphasis added), *citing McDonnell Douglas v. Green*, 411 U.S. at 804-05.[11] Using this dictum as a springboard, the court below concluded that "to defeat a summary judgment motion based only on an employer's proffered evidence of a nondiscriminatory animus, an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation is unworthy of credence." App. at 2a; *see also Chipollini v. Spencer Gifts*, 814 F.2d at 900.[12] But the decision below cannot be squared with a principled reading of *Burdine* and *McDonnell Douglas*. Those cases plainly require a plaintiff to prove "by competent evidence that the presumptively valid reasons for [the employment action] were in fact a coverup for a . . . *discriminatory* decision." *McDonnell Douglas v. Green*, 411 U.S. at 805 (emphasis added); *see also Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253 (emphasis added) ("the plaintiff must . . . prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a *pretext for discrimination*"). *See generally*, Milone, *Age Discrimination: Proving Pretext under the ADEA*, 13 Empl. Rel. L.J. 104 (1987).

[11] The narrow issue before the Court in *Burdine* was "whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a prependerance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." 450 U.S. at 250. As discussed earlier, the Court held that the employer's burden is one of production, not persuasion. *See* discussion *supra* at 8-11.

[12] The instant case comes to this Court in a significantly different posture than *Chipollini*. In *Chipollini*, unlike the instant case, the plaintiff presented evidence directly correlative to the truth of the employer's proffered reason. In the instant case, however, Respondent did not dispute the facts underlying his employer's judgment—i.e., that Faust had broader experience which was used by the Company for at least some portion of time—and produced no record evidence which raised a material factual dispute as to the credence of the employer's proffered reasons.

Only this Court can effectively resolve this "recurring area of confusion", *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200 (3d Cir. 1987), as to the proper level of proof required to defeat summary judgment in an age discrimination case. This confusion—as evidenced by the conflict among the circuits—provides sufficient grounds for reviewing the decision below.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: August 17, 1987

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3068

EUGENE F. BRIECK,

vs. *Appellant*

HARBISON-WALKER REFRACTORIES,
a division of Dresser Industries

Appeal from the United States District Court
for the Western District of Pennsylvania (Pittsburgh)
(D.C. Civil No. 84-1594)

Argued October 2, 1986

Before: WEIS and MANSMANN, *Circuit Judges*, and LUDWIG, *District Judge.**

(Filed June 19, 1987)

James H. Logan, Esq. (Argued), Suite 1208 The Bank Tower, 307 Fourth Avenue, Pittsburgh, Pennsylvania 15222, Counsel for Appellant.

James P. Hollihan, Esq. (Argued), Manion McDonough & Lucas, 600 Grant Street, Suite 882, Pittsburgh, Pennsylvania 15219, Counsel for Appellee.

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* Honorable Edmund V. Ludwig of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

This appeal raises issues most recently addressed by us in banc in *Chipollini v. Spencer Gifts*, No. 85-5573, slip op. (3d Cir. March 19, 1987), regarding the appropriateness of summary judgment for the defendant employer in discrimination cases. We held in *Chipollini* that to defeat a summary judgment motion based only on an employer's proffered evidence of a non-discriminatory animus, an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation for the discharge is unworthy of credence. We find that the record before us contains "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for (those) non-discriminatory reasons." *Id.*, slip op. at 16. The district court incorrectly required that the ADEA plaintiff's evidence establish a direct inference that the employer discharged him because of his age. Therefore we will reverse the entry of summary judgment for the defendant employer.

The appellant, Eugene F. Brieck ("Brieck"), was a salaried employee of the defendant, Harbison-Walker Refractories ("Harbison-Walker") from June 1985 [sic] until July 1982 when a decline in Harbison-Walker's business necessitated a series of layoffs. Brieck complains that his age was a factor in the employer's decision to retain Hugh F..ust instead of Brieck during the first lay-off in July 1982 and to recall Faust rather than Brieck in November 1982. Faust was the only one of four installation specialists who was under 40 years of age at the time of the layoffs. Faust had less experience as an installation specialist than Brieck, and Faust had approximately 15 months less seniority with the company. There is no dispute that Brieck, who was 55 years of age at the time of his layoff, will be able to introduce

evidence in support of a prima facie case of age discrimination.

Accompanying the defendant's motion for summary judgment was the affidavit of William Sekeras who was, at the time of Brieck's layoff, Manager of Harbison-Walker's Iron & Steel Group. Sekeras made the final decision as to individual layoffs, subject to the approval of the Vice President of Marketing.

Mr. Sekeras' affidavit listed the following reasons for Faust's longer retention and eventual recall:

> 1. Faust had more diverse skills and had considerable prior experience working as a sales correspondent prior to assuming the position of installation specialist in 1978.
>
> 2. In comparing Faust and Brieck, Faust was superior in working with records and written reports, and had considerable contact in customer relations as well as in preparation of bids and quotations, an activity which remained in the reduced business environment.
>
> 3. Brieck, on the other hand was solely an installation specialist, and his narrow skills with respect to installation work primarily in BOF shops was expendable given the fact that installation work was extremely low because of the lack of sales of Harbison-Walker products during this period.
>
> 4. In addition, Faust was the only installation specialist who had experience in installation work in blast furnace casthouses, an area that had been targeted by Harbison-Walker as a growth market and an area that represented significant potential even during the 1982 period.
>
> 5. In short, Faust possessed skills for which there was still some need even in the reduced business environment, since his administration and sales cor-

respondent experience permitted him to perform other noninstallation functions in the reduced department.

6. Faust had slightly higher performance ratings than Brieck during the 1978-1981 period.

Affidavit of William Sekeras, *reprinted in* Appendix at 30a-31a.

As the district court correctly found, Brieck has introduced no evidence to counter the assertion that Faust's prior experience with office matters such as price quotations, customer contact, and setting priorities for orders from the manufacturing plan, distinguishes his qualifications from those of Brieck. The district court credited this reason and granted summary judgment for the employer, Harbison-Walker.

The district court order denying reconsideration was entered on January 10, 1986. During the pendency of this appeal, we filed our opinion in *Chipollini* where we held that an ADEA plaintiff need not produce direct evidence of age discrimination in order to resist a motion for summary judgment based on the defendant employer's proffer of a non-discriminatory reason for the plaintiff's discharge. To meet its burden on summary judgment, the defendant employer must show that the plaintiff will be unable to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute. *Chipollini*, slip op. at 12. Where a plaintiff has offered no direct evidence of discriminatory motive, questions regarding summary judgment on the issue of intent are subsumed under the inquiry into employer pretext. *Id*, at 11. If an employee introduces "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for non-discriminatory reasons," *id.* at 16, the

district court may not weigh competing inferences and resolve disputed facts in order to grant the employer's summary judgment motion.

Brieck opposed the summary judgment motion with evidence that the employer's asserted need for Faust's diverse qualifications is inconsistent with the duties actually performed by Faust during his retention and after his recall. Faust testified that seventy-five percent of his time was spent on the road doing installations. Deposition Testimony of Hugh J. Faust, *reprinted in* appendix at 325a-26a. The remaining time was spent preparing reports of installations, an activity performed by all installation specialists including Brieck, doing some filing and working on margins. *Id.*

Faust's testimony regarding his duties after recall is inconsistent with the employer's expressed need for diverse skills gained from Faust's marketing and sales experience. This evidence raises a question of fact as to whether the employer really believed that Faust's "varied" experience made him more qualified than Brieck to perform the job functions remaining in the reduced business environment.

The district court found it "plausible that the importance of an employee's related experience, whether or not frequently applied, increases under the scaled-down business operations which in fact existed." *Brieck v. Harbison-Walker Refractories*, No. 84-1594, slip op. at 6 (W.D. Pa. December 1985). However, it is equally plausible that, if the jury finds that the asserted "more varied" skills were neither employed nor required in the position for which Faust was preferred, the jury might find the employer's asserted reason for preferring Faust to be pretextual, especially in light of Brieck's arguable ability to show that he was more qualified to perform the tasks which the retained employee was in fact required to perform. The district court erred in resolving this factual dispute. The question is not whether the employer's as-

serted reason is plausible, but whether there is also evidence of record which, if credited, could render the reason implausible.

This is not to say that an employer is required to retain the most qualified employee as perceived by the jury. It is not the function of the jury to engage in a comparison of the qualifications of the applicants and to determine thereby who should have been retained or recalled. However, where the employer relies on the comparative experience and qualifications of the two as a reason for retention of a younger employee in preference to his older co-worker who is in the protected age group, the employee may avoid summary judgment by introducing evidence that the assertedly superior skills were neither required nor employed in the position in which the younger employee was retained or to which he was recalled.

The district court further asserts that "any question about the appropriateness of how Faust now spends his time edges into the area of judicial scrutiny of business decisions, which is not part of our function." Slip op. at 6. However, there is no issue regarding the appropriateness of Harbison-Walker's employment of Faust. The question on summary judgment is whether evidence of the duties actually performed by Faust upon his recall could cast doubt on the defendant's assertion that Faust was retained because of his more diverse skills. We find the answer to be in the affirmative. Therefore, we will reverse the district court's entry of summary judgment for the defendant.

Brieck also claimed that he had received assurances from his employer that he would not be laid off and that these assurances constituted a contract of employment which was breached by his subsequent layoff. By his own affidavit and deposition Brieck offered to prove that in August, 1980 and again in February, 1982, Larry Sheatsley, General Products Manager for Harbison-

Walker, assured Brieck that he need not worry about being laid off. Brieck Deposition, *reprinted in* appendix at 142a-143a and 153a-156a. Brieck also offered proof of a company policy of basing layoffs on "length of company service and skill requirements necessary to carry out the reduced business activities." Nicollela Deposition, Exhibit 2, *reprinted in* appendix at 103a-104a. Brieck had longer service than the other installation specialists and believed himself to be the most qualified. Brieck Affidavit, *reprinted in* appendix at 106a-107a. Brieck received a merit raise effective March 1, 1982 together with a laudatory note from his supervisor regarding the quality of Brieck's work. March 8, 1982, handwritten note to Eugene F. Brieck, appellant, from his immediate supervisor, Donald Jamison, *reprinted in* Supplemental Appendix of Appellant Volume II at 359a.

We agree with the district court that these alleged assurances are not legally sufficient to overcome the presumption of employment at will under Pennsylvania law. *See, Banas v. Matthews International Corp.*, 502 A.2d 637 (Pa. Super. 1985) (en banc).

Brieck also claimed tortious infliction of emotional distress. However, this claim was not pressed before the district court nor is it raised on appeal. Therefore, we will affirm the district court in treating the claim as abandoned.

In accordance with the foregoing, we will affirm the district court's entry of summary judgment on the plaintiff's claims of breach of contract and tortious infliction of emotional distress. We will reverse the summary judgment on the ADEA claim and remand the case to the district court for proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

WEIS, *Circuit Judge*, concurring and dissenting.

I concur in the majority's affirmance of the judgment in favor of defendant on the counts for breach of employment contract and tortious infliction of emotional distress. I dissent from reversal of the judgment on the age discrimination claim.

In this case, plaintiff has the burden of presenting evidence which would allow a reasonable inference that the employer's reasons for preferring Faust over plaintiff were pretextual. I agree with the district court that plaintiff failed to meet this burden.

Essentially, the plaintiff's evidence is that he believed himself to be a better qualified installation specialist than Faust. He further opines that Faust's other duties did not require as much skill as his principal installation specialist tasks demanded. Even accepting the plaintiff's subjective appraisal as fact does not lead to an inference that the employer's proffered reasons for its actions are implausible or suspect.

The plaintiff's case is defi[illegible]nt because it glosses over the critical fact that the defe[illegible]ant's dependence on the moribund steel industry had caused substantial economic losses, with more in sight. Simply unable to avoid personnel reductions, the company faced the unpleasant task of deciding which employees to lay off.

Of the four installation specialists, plaintiff was the second to be furloughed. Company evaluations rated another installation specialist, E.G. Malarich, better than plaintiff. Malarich remained on the payroll for some additional weeks. Plaintiff, younger than Malarich, cannot complain about age discrimination in the company's decision to retain him longer.

If the company needed only one installation specialist and if Faust's qualifications were as inadequate as plaintiff believes, then one would have expected defendant to

furlough Faust. But in that event, Malarich, and not plaintiff, would have been the one retained. The plaintiff's failure to address the fact that Malarich was given preference undercuts the claim of discrimination in favor of Faust at the time of the plaintiff's layoff. In other words, plaintiff must show not only that he was discriminated against in July 1982, but that Malarich as well had qualifications superior to Faust's and suffered age discrimination at that point. To prove damage from the July furlough, plaintiff must show that discrimination was a cause of his release and that he deserved preference over Malarich.

In establishing a claim based on failure to recall, Brieck must demonstrate that Malarich would not have been the one selected by the company or that he would not have been interested in returning to work. Once plaintiff clears that hurdle, as apparently the district court assumed in granting summary judgment, the question then becomes whether plaintiff has established the implausibility of the employer's stated reasons for preferring Faust. The arguments that plaintiff advances actually lends support to defendant.

Basically, plaintiff contends that because Faust spent twenty-five percent of his time after recall preparing reports of installations (an activity Brieck had performed) as well as working on "margins" and filing (tasks which Brieck neither had done nor was trained to do), the employer has failed to demonstrate its need for Faust's diverse qualifications. Preparing "margins" required the calculation of costs on projects to insure profitability, a process in which Brieck had little, if any, background. In addition to working on margins, Faust had spent ten years as a sales correspondent pricing, making bids and quotations, and processing orders. Brieck's knowledge in these fields, in comparison, was limited.

In his supplemental brief, plaintiff stated that "to the extent Faust might have had more experience in doing

margins, Brieck had had substantial experience with Harbison-Walker in doing paper work and miscellaneous office chores, he had some knowledge of the pricing, bidding and quotation practices of his employer, and he could easily have been trained to do the work previously performed by Faust before Faust became an installation specialist." Thus, plaintiff concedes that Faust had more experience in doing margins, that plaintiff had only "some knowledge of pricing, bidding and quotation practices," and that plaintiff could "easily have been trained" to perform the other functions that Faust already could do.

Furthermore, in his affidavit in opposition to the defendant's motion for summary judgment, plaintiff asserted, "[w]hile with Harbison-Walker, I had some knowledge of the pricing, bidding and quotation practices of my employer, and to the extent that my knowledge of these practices was less than Hugh Faust's, I could easily and quickly have been trained to do all the things he had to do with regard to prices, bids and quotations."

One must question, therefore, whether plaintiff has demonstrated the implausibility of the company's asserted reasons for preferring Faust when Brieck admits his skills do not match his rival's diverse abilities. When reduced company operations warrant the service of one installation specialist for only seventy-five percent of his time, efficiency requires some utilization of the remaining twenty-five percent. Although plaintiff may argue he could work as effectively for part of that time, significantly he cannot prove his ability to perform equally well for the entire 25 percent period. The concession that he, unlike his rivals, might require training only underscores the validity of the employer's reason for selecting Faust.

Chipollini is distinguishable because the plaintiff there produced evidence making suspect specific factors which the employer asserted as justification. The plaintiff in the case at hand has not done so.

Moreover, *Chipollini* must be read in light of *Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S. Ct. 2505 (1986), and *Celotex Corp. v. Catrett*, —— U.S. ——, 106 S. Ct. 2548 (1986), which encourage the use of summary judgment when it is apparent that a jury could not reasonably find for one of the parties. Based on the record here, a jury could not properly decide in the plaintiff's favor.

I am persuaded that plaintiff has failed to show a dispute of fact on a material issue which would demonstrate pretext. I accordingly would affirm the district court's judgment in all respects.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1594

EUGENE F. BRIECK and DOLORES F. BRIECK

vs.

HARBISON-WALKER REFRACTORIES,
a division of Dresser Industries

OPINION

Plaintiffs bring this action against Mr. Brieck's former employer alleging age discrimination, breach of contract, intentional infliction of emotional distress as to Mr. Brieck, and negligent infliction of emotional distress as to Mrs. Brieck. We have before us defendant's motion for summary judgment, accompanied by affidavits and excerpts from depositions, and plaintiffs' response similarly supported. In reviewing these materials we find no dispute as to relevant facts. We must now decide whether these facts adequately support the causes of action pleaded.

FACTUAL BACKGROUND

Defendant sells and installs refractory brick and related materials to producers of steel, glass and paper. Sixty percent of its market lies with the steel industry, however, and defendant asserts that its own financial success is closely linked to the fortunes of domestic steelmakers. Defendant has stated that, between 1979 and 1982, sales of refractory materials fell from $425,000,000

to $302,000,000 and profits in the same period dropped from $64,000,000 to a loss of $20,000,000.

Defendant hired Mr. Brieck in June 1965 as an installation specialist. His primary duties consisted of supervising installation of refractory materials in steel making furnaces, training the customer's employees in operation and maintenance, and troubleshooting to resolve any complaints. Brieck was one of four installation specialists attached to the Iron and Steel Marketing Support Group. The others were W.E. Meixell, A.G. Malarich, and H.J. Faust.

As a result of poor sales in early 1982, management decided to cut expenses by laying off workers. Mr. Brieck was one of six workers in the Iron and Steel Marking Support Group to be laid off in early July 1982. Of these six, two were installation specialists: Brieck, age 55, and Meixell, age 59. In late July 1982, Malarich, then age 59, also was laid off. In mid-November 1982, Faust then age 39, the last remaining installation specialist, also was laid off. Faust was the only installation specialist to be recalled, in July 1983. Mr. Brieck argues that his layoff and Faust's recall constitutes age discrimination.

Mr. Brieck also argues that defendant has breached an implied contract of employment in laying him off. Brieck apparently relies on four statements from management as establishing his implied contract. First, Brieck stated in his deposition that Larry Sheatsley, one of his supervisors, told him in August 1980 and February 1982 not to worry about being laid off. Plaintiffs' Supplemental Brief, Docket Entry No. 20, Appendix at 20 and 21. Second, in the Spring 1982 edition of a company newsletter a vice-president of human resources stated that:

> Layoffs are implemented only after an extensive review of alternatives. Obviously, layoffs, when they

> are necessary, occur in departments or operating units most affected by the business decline. Length of company service and skill requirements necessary to carry out the reduced business activities are the most important considerations. We try to do what is right and fair.

Id. at 26-27.

Finally, Brieck received a note from Donald Jamison, another supervisor, commending him and stating that, "We hope that we can continue to reward you for your fine work." *Id.* at 38.

Plaintiffs made no arguments in their briefs regarding their claims for tortious infliction of emotional distress. We will address all counts in the complaint in turn.

AGE DISCRIMINATION

As we stated in *Pierce v. New Process Company*, 580 F.Supp. 1543 (W.D. Pa. 1984), *aff'd*, 749 F.2d 27 (3d Cir. 1985), the plaintiff in an age discrimination action must establish four elements to make out a prima facie case. This accomplished, he is entitled to a rebuttable presumption of discrimination. Plaintiff must show that he (1) is in the protected age group; (2) was the subject of an adverse employment action; (3) was qualified for the position in question; and (4) was treated less favorably than younger employees. In short, plaintiff must prove that age was "a determinative factor" in an adverse decision concerning his employment. *Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d 1393, 1394 (3d Cir. 1984).

If the plaintiff makes out a prima facie case, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for not hiring or for discharging the plaintiff. But this is a burden of production, not persuasion. "It is sufficient if the defendant's evidence raises a genuine issue of fact as to

whether it discriminated against the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981) (fn. omitted).

If the defendant proffers a legitimate reason for its actions, the plaintiff resumes his burden of persuasion. To succeed, he either must prove that unlawful discrimination more likely motivated the defendant or that defendant's explanation is merely a pretext. *Id.* at 256; *Duffy, supra; Molthan v. Temple University*, No. 84-1220, slip op. (3d Cir. December 5, 1985). Where there is a reduction in force rather than a discharge or failure to hire, the plaintiff's burden obviously is modified. In such cases, the plaintiff simply must show that younger employees working in similar jobs were retained. *Duffy*, 738 F.2d at 1395, notes 2 and 3. This modification is not material here, however, since it is uncontested that defendant recalled Hugh Faust, a younger employee, in July 1983 to work as its only installation specialist in the Iron and Steel Marketing Support Group.[1]

PRIMA FACIE CASE

The burden of making out a prima facie case is not onerous, and we find that plaintiff has done so. He was 55 years old when he was laid off. He certainly was qualified to work as an installation specialist, the job now held by Faust, a younger employee.

Defendant responds with its explanation of bona fide business reasons behind its action. Of the four installation specialists, Meixell, Brieck, Malarich and Faust, Meixell was the oldest at 59, but had only two years of seniority at the time of his layoff in July 1982. Brieck was laid off at the same time. Malarich is four years older than Mr. Brieck, so his layoff is not consequential.

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[1] Brieck has shown no evidence that he was qualified to assume the responsibilities of any other job.

Faust's employment until November 1982 and recall in 1983, as characterized by plaintiff, is the offensive act.

While Faust is 16 years younger than Mr. Brieck, Brieck has only a year more seniority. In performance evaluations, Faust was rated slightly higher.[2] But the chief reason for retaining Faust, according to defendant, was his prior experience as a sales correspondent. He thus was practiced in working with records and written reports, in customer relations, and in preparing bids and quotations.

Plaintiffs attempt to expose these alleged justifications as pretext by coloring Faust's prior experience as unimportant. In his deposition, Brieck referred to Faust's former position as being that of an "office boy" and a "gofer", that is, an employee whose duties include running errands. Plaintiff's Supplemental Response in opposition, Appendix at 12 and 13. Indeed, Faust testified at his own deposition to being an office handyman when he was a staff correspondent. *Id.* at 47. But these were not and are not his principal duties, *Id.* at 42, and Brieck does not refute Faust's prior experience with office matters such as price quotations, customer contact, and setting priorities for orders from the manufacturing plant.

Mr. Brieck further attempts to downplay Faust's experience by pointing out that his knowledge of office matters actually is of no consequence to defendant since Faust spends about three-fourths of his time on installa-

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[2] The following chart summarizes key statistics involved in this case:

	Age in June 1982	Date Hired	Performance Evaluations (5 represents highest grade) 1978	1979	1980	1981
FAUST	39	Sept. 1966	4	3	3	3
BRIECK	55	June 1965	3	2	2	3

tion work. Any question about the appropriateness of how Faust now spends his time edges into the area of judicial scrutiny of business decisions, which is not part of our function. We nonetheless consider it plausible that the importance of an employee's related experience, whether or not frequently applied, increases under the scaled-down business operations which in fact existed. Without considering age, we find that Mr. Brieck, in comparison to Faust, has

1. slightly more seniority;
2. slightly poorer performance evaluations;
3. little experience in areas related to installation specialist.

We thus cannot find that age was a determinative factor in the decision to lay off Mr. Brieck.

Other facts support this finding. Prior to the June 1982 layoffs, the Iron and Steel Marketing Support Group employed 32 people, 14 of whom were above the age of 40. Of the 11 employees who subsequently were laid off, only three were more than 40 years of age. Even considering the employees who were recalled, the average age of the group was .04 of a point higher after layoffs than before. Affidavit of William Sekeras, Docket Entry No. 17, Exhibits D and E. Of course, these statistics are not themselves conclusive, but they further highlight Mr. Brieck's absence of proof that defendant's justification for his layoff is a pretext for age discrimination.

BREACH OF CONTRACT

On this claim plaintiff concedes that there is no distinct common law cause of action for breach of contract resulting from age discrimination; remedies for age discrimination must be sought under state and federal statutes enacted to address the problem. *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3d Cir. 1977). Citing

DeRamo v. Consolidated Rail Corporation, 607 F.Supp. 100 (E.D. Pa. 1985), he urges that his breach of contract claim nevertheless should be considered because it is not grounded on age discrimination. Rather, without raising the issue of age discrimination, he asserts that the act of laying him off violated the terms of an implied contract of employment. We believe that this question of contract rights adequately describes a cause of action separate from the statutory claim of age discrimination and the related tort theory of wrongful discharge for age discrimination. Plaintiffs' pleadings present a claim for breach of contract without reference to age which could support a separate recovery.

Plaintiffs' adequate pleading of their contract claim, however, does not include sufficient evidence to protect them from summary judgment. As stated above, Mr. Brieck was told in August 1980 and February 1982 by Larry Sheatsley, one of his supervisors, that he should not worry about being laid off. In spring of 1982 a Dress [sic] vice-president stated in the company news letter, that in deciding on layoffs, "Length of company service and skill requirements necessary to carry out the reduced business activities are the most important considerations." Finally, a note from Brieck's immediate supervisor informing him of a merit raise stated that, "we [Dresser] hope we can continue to reward you for your good work." See pp. 2 and 3 infra. Viewing dant's [sic] statements most favorably to plaintiffs, they do not establish the violation of a contract.

The general rule in Pennsylvania has long been that contract for personal services are presumed terminable at will by either party absent some provision setting the duration of the contract. *Henry v. Pittsburgh & Lake Erie Railroad Co.*, 139 Pa. 289, 21 A. 157 (1891); *Cummings v. Kelling Nut Co.*, 368 Pa. 448, 84 A.2d 323 (1951); *Jackman v. Military Publications, Inc.*, 350 F.2d

383, (3d Cir. 1965). Plaintiff may overcome this presumption by showing that the parties did agree to a contract of definite duration or by "evidence showing that the plaintiff-employee gave the defendant-employer consideration in addition to the employee's normal services." *Gravman v. Bassett Furniture Industries, Inc.*, 552 F.2d 90, 92 (3d Cir. 1977) (footnote omitted); *See also McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979). In the latter instance, the contract is deemed to be for a reasonable time.

Mr. Brieck relies on no express written oral agreement; his evidence concerning a contract for employment rests solely in the statements above. We find this evidence insufficient to satisfy the requirement for a provision setting the length of the contract. The statements lack any reference to any future point. In *Geib v. Alan Wood Steel Co.*, 419 F. Supp. 1205 (E.D. Pa. 1976), plaintiff was granted a contract "until retirement." In *Lightcap* v. *Keaggy*, 128 Pa. Super. 348, 194 A. 347 (1937), the contract was extended for the period "so long as you live". Neither statement was found sufficient to support a cause of action. The statements on which plaintiffs rely are considerably more ambiguous. Mr. Brieck thus has not established the form of a contract which supports his claim. *Adams v. Budd Co.*, 583 F. Supp. 711 (E.D. Pa. 1984).

TORTIOUS INFLICTION OF EMOTIONAL DISTRESS

Plaintiffs make no argument regarding their claims of intentional and negligent infliction of emotional distress in either of their briefs opposing defendant's motion for summary judgment, raising the likelihood that claims have been abandoned. In any event, we find that defendant's conduct in no way rises to the level of outrageousness necessary to invoke these theories.

The Court of Appeals for the Third Circuit has determined that, under Pennsylvania law, the international branch of this tort is composed of four elements:

(1) extreme and outrageous conduct;

(2) intention or recklessness;

(3) emotional distress in the victim caused by the conduct; and

(4) distress that is severe.

Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273 (3d Cir. 1979); Restatement (2d) of Torts, § 46(1) (1965). The extremeness of behavior associated with this tort necessarily means that it rarely will be found. One example is *Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 1118 (1970), in which the parents of a dead child recovered from an automobile driver who caused the child's death, when the driver concealed the child's body for two months. Another is *Chuy, supra*, in which a football team's physician reported to the press that a player had suffered from a potentially fatal blood disease, knowing this diagnosis was unsupported. While loss of employment is unfortunate and unquestionably causes hardships, often severe, we must acknowledge that it is a common event. It has been denied as a basis for this tort. *Cautilli v. GAF Corporation*, 531 F. Supp. 71, (E.D. Pa. 1982). Without belaboring the point, we conclude that the plaintiff clearly has not shown that defendant's conduct meets the test of extremeness required by this theory. Our finding necessarily precludes Mrs. Brieck's claim of negligent infliction of emotional distress based on defendant's same actions.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1594

EUGENE F. BRIECK and DOLORES F. BRIECK

v.

HARBISON-WALKER REFRACTORIES,
a division of Dresser Industries

ORDER

Defendant's Motion for Summary Judgment is GRANTED, and the case is DISMISSED.

SO ORDERED this 19th day of December 1985.

/s/ Gerald J. Weber
GERALD J. WEBER
United States District Judge

cc: James H. Logan, Esq.
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MEMORANDUM OPINION

On January 8, 1986, plaintiffs moved for the Court to reconsider our December 19, 1985 Opinion and Order granting defendant's motion for summary judgment. Upon review of our actions in light of plaintiffs' exceptions, we find no grounds for relief.

Defendant's motion under Federal Rule of Civil Procedure 56 was a challenge for both parties to produce evidence. Defendant had the rigorous burden of proving the absence of factual dispute and entitlement to judgment as a matter of law; plaintiffs were held simply to show a dispute of fact. In our opinion, applying governing case law, we found that Mr. Brieck made out a prima facie case of age discrimination.

Proceeding to the next phase of analysis, we found that defendant satisfied its resulting burden by producing evidence of legitimate business reasons for its actions. Plaintiffs then were required to resume their burden of persuasion in proving that age more likely motivated defendant or that its explanation was a pretext.

In attempting to carry this burden, plaintiffs failed to forge the critical link between defendant's actions and Mr. Brieck's age with *relevant* proof. The Court understood that Mr. Brieck had received a favorable note from a superior three months before his layoff, and had been sent on international assignments. Mr. Brieck's individual level of competence was not contested. We found it unnecessary to mention these and similar facts, however, because plaintiffs did not prove how these facts were at all related to a discharge motivated by age. Plaintiffs affidavits suffer from the same fault; they are conclusory and refer to no corroborating evidence. It would be improper for a jury to decide for plaintiffs in discrimination cases on this evidence alone. To deny summary judgment on the basis of these statements would render Rule 56 meaningless, since such claims may be pleaded by plaintiffs in all cases regardless of their other merits.

Plaintiffs repeatedly cite dicta concerning the limited scope of summary judgment, but this argument again is wide of the mark, distracting from the central issue on summary judgment, reference to disputed facts. The mere incantation that disputes exist, or that summary judgment is to be narrowly applied, is unpersuasive. We did not track the language of Rule 56 in our opinion, but we have no doubt that the opinion as a whole is true to its provisions. See Typescript Opinion at 7.

Plaintiffs also protest our description of Mr. Brieck on page 6 as having "little experience in areas related to installation specialist." It appears that our use of the word "related" is stricter than counsels' understanding, since defendant, after receiving plaintiffs' motion, also seeks to have this statement amended by changing the word to "unrelated." We referred to an installation specialist as one who supervises installations of refractory material, trains customers employees in operation and maintenance, and trouble-shoots to resolve complaints. See Typescript Opinion at 2. We referred to areas re-

lated to installation specialist as those which do not involve actual installation, such as price quotations, customer contract, and factory ordering, but which are executed by other personnel before and after the installation as part of the overall business of selling refractory products. Thus, "related" was intended to convey the meaning of areas connected with installation work without actually being part of it. We found that experience in these areas distinguished the relative qualifications of Brieck and Faust. In failing to create a dispute of fact over this issue by reference to relevant proof, and thus failing to refute defendant's explanation of legitimate reasons for its actions, there was no obstacle to finding defendant entitled to judgment as a matter of law. In any event, we will attempt to clarify our opinion by adding the word "other" to our language on page 6, so that the clause will read, "little experience in other areas related to installation specialist."

Finally, plaintiffs have not identified the rule under which they file their motion. It can only fall under Rule 60 since it was not filed within 10 days of our December 19, 1985 order as required by Rule 59. *Sonnenblick-Goldman Corp. v. Nowalk*, 420 F.2d 858 (3d Cir. 1970). Under Rule 60, however, the time for filing appeal is not tolled. We therefore will enlarge the time for appeal for 10 days beyond the date of this order.

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ORDER

Plaintiffs' Motion for Reconsideration of the Court's December 19, 1985 Opinion and Order is DENIED. The time for filing an appeal from that Order is enlarged for 10 days beyond the date of this order. Furthermore, the Opinion accompanying the December 19, 1985 order shall be amended in accordance with the foregoing opinion. This amendment in no way affects the judgment.

SO ORDERED this 16th day of January 1986.

/s/ Gerald J. Weber
GERALD J. WEBER
U.S. District Judge

cc: All Counsel